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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING, PETITIONER,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1953.

CERTIORARI GRANTED OCTOBER 19, 1953.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 26, 1953.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

TOM WE SHUNG, by His Next Friend, TOM WING, *Appellant*,

vs.

J. HOWARD MCGRATH, Attorney General of the United States, and WATSON B. MILLER, Commissioner of Immigration, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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AMENDED COMPLAINT

Filed June 10, 1950

The plaintiff respectfully alleges:

1. That this is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. A. 2201) and for Review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.).

2. That Tom Wing is a citizen of the United States and an honorably discharged veteran of World War II, and is duly authorized to act as next friend of the plaintiff, Tom We Shung.

3. That the plaintiff, Tom We Shung is the blood son of the said Tom Wing.

4. That the plaintiff, Tom We Shung is an infant twenty years of age.

5. That the defendant, J. Howard McGrath, is Attorney General of the United States and is charged with the statutory duty to determine after appropriate hearings whether aliens are to be deported from the United States.

6. That the defendant, Watson B. Miller, is the Commissioner of Immigration and Naturalization and is in direct charge of the administration of the immigration laws under the Attorney General.

7. That Tom Wing sought the admission to the United States of his son, Tom We Shung, under the provisions of Public Law 271, 79th Congress (8 U. S. C. A. 232).

8. That on or about November 28, 1947, the plaintiff Tom We Shung presented himself for admission to the United States, and in January of 1948 and February of 1949, hearings were held before a board of special inquiry at San Francisco, California, which determined the said Tom We Shung was inadmissible to the United States on the ground that he had not established that he was the son of Tom Wing.

9. That permanent and regularly constituted boards of special inquiry are available and are stationed at San Francisco. That the board of special inquiry which presided over plaintiff's case was not composed of three immigration officials in the service of the Commissioner, but on the contrary and in violation of the applicable law and regulations was composed of two immigrant officials and a clerk-stenographer.

10. That the aforesaid board of special inquiry was subject to the control of a District Director at San Francisco and other officials who were and are engaged in investigatory functions.

11. That the aforesaid hearing was unfair and null and void and in violation of the provisions of the Administrative Procedure Act (5 U. S. C. 1004).

12. That the aforesaid board of special inquiry was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act (5 U. S. C. 1010).

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13. That the aforesaid order denying the plaintiff Tom We Shung admission to the United States on the ground that he had not established that he was the son of Tom Wing was affirmed by the defendant Watson B. Miller and the Board of Immigration Appeals acting for the defendant, J. Howard McGrath.

14. That the plaintiff submitted in the administrative proceedings herein his own sworn testimony, the testimony of his father, Tom Wing, and a birth certificate in support of his claim that he was the blood son of Tom Wing.

15. That there was no affirmative evidence contrary to such testimony.

16. That the plaintiff established by substantial evidence in the aforesaid administrative proceeding that he was the blood son of Tom Wing.

17. That the finding of the defendants to the contrary was not supported by substantial evidence or by any evidence whatsoever.

18. That plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232).

WHEREFORE plaintiff requests an order declaring that the hearing acorded the plaintiff before the board of special inquiry was unfair, null and void, and further declaring that the plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232).

JACK WASSERMAN,
Attorney for Plaintiff,
501 13th St., N. W.,
Washington 4, D. C.

ANDREW REINER,
Of Counsel.

ANSWER TO AMENDED COMPLAINT

Filed Nov. 1, 1950

First Defense

The complaint fails to state a cause of action upon which relief may be granted.

Second Defense

The Court lacks jurisdiction over the subject matter.

Third Defense

Specifically answering the numbered paragraphs of the amended complaint, defendant admits, denies, and avers as follows:

1. Paragraph 1 of the amended complaint states conclusions of law which defendant is not required to admit or deny. Insofar as an answer may be required, the allegations are denied.

2. The allegations of Paragraph 2 are admitted.

3. The allegations of Paragraph 3 are denied.

4. The allegations of Paragraph 4 are admitted.

5. The allegations of Paragraph 5 are admitted.

6. The allegations of Paragraph 6 are admitted.

7. The allegations of Paragraph 7 are admitted, except that defendant denies that Tom We Shung is the son of Tom Wing.

8. The allegations of Paragraph 8 are admitted.

9. Defendant admits that permanent and regularly constituted boards of special inquiry are available and stationed in San Francisco. Defendant avers that the Board of Special Inquiry before which plaintiff appeared was a properly constituted board. The remaining allegations of Paragraph 9 are denied.

10. The allegations contained in Paragraph 10 are admitted.

11. The allegations of Paragraph 11 are denied.

12. The allegations of Paragraph 12 are admitted but defendant denies that Boards of Special Inquiry are required to be appointed in conformity with the Administrative Procedure Act.

13. The allegations of Paragraph 13 are admitted.

14. Defendant admits that plaintiff submitted in the administrative proceedings his sworn testimony, as well as the testimony of Tom Wing. Defendant denies that Tom Wing is the father of plaintiff and that a birth certificate was submitted. Defendant avers that a self-serving declaration which purported to be a certificate of plaintiff's birth was submitted.

15. The allegations of Paragraph 15 are denied. There are many inconsistencies in the testimony of plaintiff and of Tom Wing, which inconsistencies were sufficient to indicate that plaintiff was not the son of Tom Wing.

16. The allegations of Paragraph 16 are denied.

17. The allegations of Paragraph 17 are denied.

18. The allegations of Paragraph 18 are denied.

WHEREFORE, defendant demands that the complaint be dismissed with costs to the plaintiff.

PRETRIAL PROCEEDINGS

Filed Nov. 29, 1950

Statement of Nature of Case:

This is an action for declaratory judgment by which the plaintiff seeks two forms of relief: First, he seeks a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) declaring that he is the son of Tom Wing, an honorably discharged veteran of World War II and as such that he is admissible to the United States under Public Law 271, 79th Congress (8 U. S. C. A. 232); and second, for review under the Administrative Procedure Act and a declaratory judgment that the administrative hearing accorded him before a board of special inquiry was unfair and null and void because the board of special inquiry was not composed as required by the Immigration statute because its members were subject to the control of those engaged in investigatory functions, because the evidence of his relationship to his alleged father was established by substantial evidence, and the contrary was not established by substantial evidence, and finally because the hearing was not in accordance with the Administrative Procedure Act.

The parties stipulate that Tom Wing is a citizen of the

United States and an honorably discharged veteran of World War II and that the plaintiff seeks admission at San Francisco as the alleged son of Tom Wing.

It is further stipulated that permanent and regularly constituted boards of special inquiry are available and are stationed at San Francisco and that the board of special inquiry which presided over plaintiff's case was composed of two immigrant inspectors and a secretary who was a clerk-stenographer in the employ of the Immigration Service and who acted as the third member of the said board.

It is further stipulated that the board of special inquiry was not composed of hearing examiners appointed in conformity with the Administrative Procedure Act and that the aforesaid members of the board of special inquiry were subject to the control of the district director at San Francisco and other officials who were engaged in investigatory functions.

The plaintiff contends that he is the blood son of Tom Wing and that his hearing was unfair because of the reasons mentioned above.

The defendants contend that the plaintiff is not the son of Tom Wing and the hearing was properly conducted; that the board was property composed of immigration officials, and that compliance with the Administrative Procedure Act was not required by law.

Counsel for the plaintiff agrees to submit the plaintiff and his alleged father to a blood test to be performed by such medical laboratory or physician as may be mutually agreed upon or as shall be designated by this court or the trial court.

STIPULATIONS: By agreement of counsel for the respective parties, present in court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

BOLITHA J. LAWS,
Pre-Trial Justice.

Dated: November 29, 1951.

Attorneys authorized to Act:
JACK WASSERMAN, *Plaintiff;*
ROSS O'DONOGHUE, *Defendant.*

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MEMORANDUM

Filed February 27, 1952

This is an action for a declaratory judgment under the Declaratory Judgment Act and for review under the Administrative Procedure Act in connection with the exclusion of a Chinese alien. The plaintiff in his complaint requests "an order declaring that the hearing accorded the plaintiff before the Board of Special Inquiry was unfair, null and void, and further declaring that the plaintiff Tom We Shung is the blood son of Tom Wing and is admissible to the United States under Public Law 271, 79th Congress (8 USC 232)."

The plaintiff contends that the hearing before the Board of Special Inquiry which heard his case was null and void for the reasons that the Board was improperly composed of two immigrant officials and a clerk-stenographer; that the Board was subject to the control of officials engaged in investigatory functions, in violation of Section 5(c) of the Administrative Procedure Act [5 USCA § 1004(c)]; and that the Board was not composed of hearing examiners appointed in conformity with Section 11 of the Act (5 USCA § 1010). Plaintiff further contends that the finding of the Board should be set aside under the provision of Section 10(e)(B)(5) of the Act [5 USCA § 1009(e)(B)(5)] because it was not supported by substantial evidence or any evidence whatsoever.

Even before enactment of Public Law 843, 81st Congress, which specifically exempted immigration proceedings from the hearing provisions of the Administrative Procedure Act, they had been held inapplicable to exclusion proceedings before a Board of Special Inquiry, since Section 7(a) of the Act [5 USCA § 1006(a)] specifically exempts from these provisions proceedings before "boards or other officers specifically provided for by or designated pursuant to statute."[1]

Since Section 10(e)(B)(5) is confined to hearings held pursuant to the Act, it would be inapplicable to the hearing

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[1] *U. S. ex rel. Saclarides, et al.*, v. *Shaughnessy*, 180 F. 2d 687, 689.

here involved, even if Section 10 be held applicable to immigration proceedings.

Since the complaint presents an actual controversy between the alien and immigration officials over the plaintiff's eligibility under 8 USCA § 232 for admission to the United States, which enables the plaintiff to sek judicial review under the Declaratory Judgment Act (28 USCA § 2201),[2] it is not necessary to consider the applicability of the judicial review provision of the Administration Procedure Act.

Under the express provisions of the statute, the decision of the Board of Special Inquiry is final, when affirmed on administrative appeal, and is reviewable by the courts only when the administrative officers have manifestly abused the power and discretion conferred on them.[3]

The scope of review under the facts in this case—an exclusion case involving the attempted entry into this country by a Chinese alien—is therefore limited to a determination of (a) whether the statutory requirements have been complied with, and (b) whether there has been an abuse of discretion by the immigration authorities. This is so whether the plaintiff's action be considered under the Declaratory Judgment Act or under Section 10(e) of the Administrative Procedure Act.

I find that there has been compliance with the applicable statutory requirements, and that the Board of Special Inquiry was properly constituted. I further find that, even if it were not so constituted, no timely objection was made thereto, although the plaintiff was admittedly represented by counsel particularly experienced and competent in such matters, and that the point, if valid, is not now available.

The Act under which the Board of Special Inquiry is authorized and operates provides specifically that the concurrence of two of its members is sufficient for board action (8 USCA § 153). No challenge was made or is now made of the fact that two members of the Board were lawfully members thereof, and the record discloses that the Board found

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[2] *McGrath* v. *Kristensen*, 340 U. S. 162, 169.

[3] *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 263; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543 .

unanimously that the applicant had failed to satisfactorily establish that he is the blood son of Tom Wing.

I further find that the hearing accorded the plaintiff was a fair one.

I have reviewed the entire record and not only find there was no abuse of discretion by the authorities, but conclude that the record adequately justifies the action taken. The record warrants the conclusion that the denial of admission was not based merely on minor discrepancies, but rather that the discrepencies, material or immaterial, were considered in connection with the entire record in determining the credibility of the plaintiff, his father, and his witness, and that the Board did not act arbitrarily in disbelieving the testimony offered in support of plaintiff's application for admission.[4]

I therefore find that the plaintiff's prayers should be denied, and the amended complaint be dismissed.

Counsel will please present appropriate findings of fact, conclusions of law, and judgment.

(Signed) R. B. KEECH,
Judge.

February 27, 1952.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed March 7, 1952

This case having come on for trial and the Court having considered the file of the case, and having heard argument of counsel, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff was born in China and sought admission to the United States, claiming to be the son of an American citizen who had acquired citizenship after plaintiff's birth.

2. A hearing was afforded plaintiff by a Board of Special Inquiry of the Immigration and Naturalization Service which was composed of two immigration inspectors and the

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[4] *O'Connell ex rel. Kwong Han Foo* v. *Ward*, 126 F. 2d 615, 620.

clerk-stenographer in the employ of the Immigration and Naturalization Service. The Board concluded that plaintiff was not a son of a citizen of the United States.

Conclusions of Law

1. This Court has jurisdiction to review the determination of the Board of Special Inquiry under the provisions of the Declaratory Judgment Act, 28 U. S. C. 2201.

2. The scope of review under the facts in this case—an exclusion case involving the attempted entry into this country by a Chinese alien—is therefore limited to a determination of (a) whether the statutory requirements have been complied with, and (b) whether there has been an abuse of discretion by the immigration authorities. This is so whether the plaintiff's action be considered under the Declaratory Judgment Act or under Section 10(e) of the Administrative Procedure Act.

3. There has been compliance with the applicable statutory requirements by the officials of the Immigration and Naturalization Service and the Board of Special Inquiry was properly constituted.

4. Even if it were not properly constituted, plaintiff waived any objection thereto by failing to object to the constitution of the Board at the time of hearing.

5. Plaintiff received a fair hearing and there was no abuse of discretion by the authorities.

6. The evidence before the Board of Special Inquiry amply supports its conclusions.

Defendants are entitled to judgment.

R. B. KEECH,
Judge.

Dated: 3/7/52.

JUDGMENT

Filed March 7, 1952

This cause having come on for trial and the Court having found for the defendants, as more fully appears in its memorandum opinion filed herein, and its findings of facts

and conclusions of law, it is by the Court this 7th day of March, 1952,

Ordered that judgment be, and the same is hereby, ordered for the defendants.

R. B. KEECH,
Judge.

NOTICE OF APPEAL

Filed March 28, 1952

Notice is hereby given that Tom We Shung, by his next friend, Tom Wing, the plaintiff above named, hereby appeals from the judgment for the defendants entered on March 7, 1952

STIPULATION DESIGNATING RECORD

Filed April 4, 1952

It is hereby stipulated by and between the attorneys for the respective parties herein that the record on appeal consist of the following:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Pre-trial Memorandum.
4. Memorandum of Court.
5. Findings of Fact and Conclusions of Law.
6. Immigration File.
7. Judgment.
8. Notice of Appeal.
9. Stipulation designating record.

(S.) ROSS O'DONOGHUE,
Assistant U. S. Attorney.
(S.) JACK WASSERMAN.

ORDER AS TO EXHIBIT

Filed April 7, 1952

It is by the Court this 7th day of April, 1952, Ordered That the Immigration file of the plaintiff, heretofore filed

in this case, shall be transmitted to the Court of Appeals in its original form and shall not be photostated or otherwise reproduced.

WALTER M. BASTIAN,
Judge, United States District Court.

(2561)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11417

TOM WE SHUNG, by his next friend,
Tom Wing, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General
of the United States, and WATSON B. MILLER,
Commissioner of Immigration, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided July 2, 1953

Mr. Jack Wasserman for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom *Messrs. Charles M. Irelan,* United States Attorney at the time of argument, *Ross O'Donoghue* and *William R. Glendon,* Assistant United States Attorneys at the time of argument, were on the brief, for appellees. *Messrs. Leo A. Rover,* United States Attorney, *Joseph M. Howard,* Assistant United States Attorney at time record was filed, and *William E. Kirk, Jr.,* Assistant United States Attorney at time brief was filed, also entered appearances for appellees.

Before WILBUR K. MILLER, PROCTOR and FAHY, Circuit Judges.

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PER CURIAM: Tom We Shung, appellant, is an alien born in China. He sought entry into the United States under authority of Act of Dec. 28, 1945, c. 591, § 1, 59 STAT. 659, 8 U. S. C. § 232 (1946 ed.),[1] upon the claim that he was a minor child of one Tom Wing, an honorably discharged veteran of World War II with United States citizenship. Admission was denied Shung upon the ground, as determined by a Board of Special Inquiry, that he had failed to satisfactorily establish his alleged relationship with Tom Wing. Suit was then filed in the District Court for a review under the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* (1946 ed.), and for a declaratory judgment[2] that the hearing before the Board of Special Inquiry was unfair and void; and that Tom We Shung is the blood son of Tom Wing and so admissible to the United States.

In the course of hearings before the three-member Board of Special Inquiry its personnel was changed between hearings by substitution of one Immigration Inspector for another, and by substitution of a secretary, or clerk-stenograper, in place of another of the same rank. However, the members making final determination were familiar with all the evidence and no objection was

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[1] "That notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States . . . ."

[2] 28 U. S. C. § 2201 (Supp. V, 1952).

raised to the changes either at the hearings or at any stage of the administrative proceedings.

On this appeal appellant repeats contentions unsuccessfully urged in the District Court. They involve composition of the Board, legal incompetency of its members, changes in its personnel during the hearings, and sufficiency of the evidence to support the decision and order of exclusion, from which it is argued that the proceedings were unfair and a legal nullity. These questions are fully dealt with by District Judge Keech in an opinion reported in 103 F. Supp. 507 (1952). We agree with his conclusions (1) that the Board was properly constituted, if not, that failure to make timely objection to its composition rendered the point unavailable now,[3] (2) that the hearings by the Board were fair and its decision sufficiently supported by the evidence.

The recent decision of the Supreme Court in *Heikkila* v. *Barber,* 345 U. S. 229 (March 16, 1953), may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus. However, as appellant has been accorded the benefit of a full review and questions concerning validity of the administrative proceedings have been considered and resolved against him, it is unnecessary for us to consider the question now.

Affirmed.

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[3] See United States v. Tucker Truck Lines, 344 U. S. 33 (November 10, 1952), decided after the decision of the District Court in the present case.

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[fol. 16] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

TOM WE SHUNG, by His Next Friend, TOM WING, Appellant,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, and Watson B. Miller, Commissioner of Immigration, Appellees

Appeal from the United States District Court for the District of Columbia

Before Wilbur K. Miller, Proctor and Fahy, Circuit Judges

JUDGMENT—Filed July 2, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Curiam.

[File endorsement omitted.]

[fol. 17] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,417

[Title omitted]

DESIGNATION OF RECORD—Filed July 10, 1953

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the

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United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Opinion of the Court of Appeals.
3. Judgment of the Court of Appeals.
4. Designation of record.
5. Clerk's certificate.

Jack Wasserman, Counsel for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Designation of Record has been served upon Appellee by mailing a copy thereof to his attorney, Hon. Leo A. Rover, United States Attorney at Washington, D. C. this 9th day of July, 1953.

Jack Wasserman, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, by His Next Friend Tom Wing, Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, et al.

ORDER ALLOWING CERTIORARI—Filed October 19, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.